U.S. Department of Labor

Office of Administrative Law Judges
800 K Street, NW, Suite 400-N
Washington, DC 20001-8002

(202) 693-7300
(202) 693-7365 (FAX)

Issue Date: 17 November 2005

In the Matter of

Case No.: 2005 BLA 05321

JAMES D. PLYLER
Claimant

v.

BERRY MOUNTAIN MINING CO., INC.
Employer

and

AMERICAN RESOURCES INSURANCE CO.
Carrier

and

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS
Party-In-Interest

Patrick K. Nakamura, Esq.
Birmingham, AL
For the Claimant

Lance O. Yeager, Esq.
Louisville, KY
For the Employer/Carrier

Before: JEFFREY TURECK
Administrative Law Judge

DECISION AND ORDER DENYING BENEFITS[1]

[1] Citations to the record of this proceeding are abbreviated as follows: CX – Claimant's Exhibit; EX – Employer's Exhibit; DX – Director's Exhibit; ALJX – Administrative Law Judge's Exhibit; TR – Hearing Transcript; 1995 TR – Transcript of the 1995 hearing. Director's Exhibit 1 is the file from the miner's initial claim. The 1995 transcript is part of DX 1.

This is a subsequent claim for benefits arising under the Black Lung Benefits Act, 30 U.S.C. 901 *et seq.* (hereinafter "the Act"). James Plyler ("miner" or "claimant") filed his first claim on January 25, 1994. That claim was denied by Judge Quentin McColgin on October 2, 1995; Judge McColgin's denial of benefits was affirmed by the Benefits Review Board on June 6, 1996. The miner filed a subsequent claim on January 30, 2003, for which Berry Mountain Mining Co. was designated as the responsible operator. That claim was denied by the Office of Workers' Compensation programs on July 29, 2004, and claimant requested a hearing.

A formal hearing was held on April 19, 2005 in Birmingham, Alabama. Claimant was the only witness. The issues contested by the employer were pneumoconiosis, causal relationship, total disability, causation, change in conditions and its designation as the responsible operator.[2] Based on the evidence contained in the record of this proceeding, I find that the claimant still is not entitled to benefits.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Background

Claimant is 74 years old, married, and his wife is his only dependent under the Act. Claimant completed school through the 8th grade, but he has a GED (1995 TR, at 16). Claimant worked as an underground coal miner for 16 years, 9 months (TR 9). His primary job in the mines was as a driller in surface mines (TR 18-19). This job required claimant to lift drill bits and other parts weighing from 45 to 60 pounds (TR 18-21). He had to stand all day while he was a driller (1995 TR at 13). He last worked as a miner in 1986, when the mine at which he was working shut down (1995 TR at 9; claim forms).

After he left coal mining, claimant went to work as a truck driver for M.D. Weeks Trucking and then Asheville Hardwood (*id*. at 9, 18; DX 6, at 31). He worked for Asheville

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[2] Prior to the hearing, the employer moved to be dismissed as the responsible operator, contending that collateral estoppel should apply regarding Judge McColgin's determination in the initial claim that the Trust Fund was liable if benefits were awarded. On March 4, 2005, I denied employer's motion, holding that collateral estoppel was not applicable (*see* ALJX 1). At the hearing, employer again moved for its dismissal as the responsible operator, this time contending that under 20 C.F.R. §725.309(d)(4), the Director's stipulation at the hearing on the initial claim that the Trust Fund would be responsible for the claim if benefits were awarded is binding in this subsequent claim. Section 725.309(d)(4) does state that "any stipulation made by any party in connection with the prior claim shall be binding on that party in the adjudication of the subsequent claim." But all the Director stipulated to at the prior hearing was that, between the prior designated responsible operator and the Trust Fund, the Trust Fund was responsible for the claim. Berry Mountain Mining Co. was not a party in the initial claim, and no stipulation was made regarding Berry Mountain's possible responsibility for benefits. Accordingly, the Director is not precluded from designating Berry Mountain as the responsible operator for this subsequent claim.

Since this claim is being denied, no purpose would be served by further addressing the responsible operator issue in this decision.

Hardwood until 1993 (DX 1, *Employment History* form, 1993 wage statement, *Description of Coal Mine Work and Other Employment* form). Although the claimant stated that he retired because he did not believe his reflexes were good enough anymore to drive a truck, he retired at the time he became eligible for Social Security (1995 TR at 18-19). But even after he retired he still worked part-time doing odd jobs with a welding company, until 2001 (*id*. at 9; DX 4; DX 6, at 32-34).

In regard to his health, claimant has coal workers' pneumoconiosis.[3] In addition, he started smoking cigarettes at the age of 15. He smoked a pack a day at least through April, 2003, when he was examined by Dr. Hawkins (DX 10), and admitted at his deposition in May, 2004 that he was still smoking half a pack a day (DX 6, at 40). Nevertheless, although he has been diagnosed with chronic obstructive pulmonary disease ("COPD") since as early as 1997 (EX 4), the extensive medical records in evidence generally state that the claimant is not suffering from shortness of breath or dyspnea on exertion (*see* EX 4-6). What the claimant does suffer from is severe coronary artery disease ("CAD"), and on the few occasions where shortness of breath is noted in claimant's medical records, it is in connection with CAD (*e.g*., EX 6). Due to CAD, claimant underwent cardiac catherization and triple bypass surgery in August, 2001 (*id*.). In addition, claimant suffers from hypertension, depression, dementia, cerebral vascular disease with transient ischemic attack, and vision problems.

Change in Conditions

This is a subsequent claim for black lung benefits. Since the subsequent claim was filed after January 19, 2001, the regulations contained in Parts 718 and 725 as amended in 2001 are applicable.[4] Under §725.309(d)(2), which applies to subsequent claims, the claimant must make an initial showing that one of the applicable conditions of entitlement upon which the prior denial was based has changed. Accordingly to *Lisa Lee Mines v. Director, OWCP,* 85 F.3d 1358 (4th Cir. 1996)(*en banc*), which has been endorsed by the Eleventh Circuit, where this case arises, *see U.S. Steel Mining Co. v. Director, OWCP*, 386 F.3d 977 (11th Cir. 2004), the court "requires [a] claimant to prove under all the probative medical evidence of his condition after the prior denial, at least one of the elements previously adjudicated against him" (*id.* at 1362). In connection with claimant's previous claim, it was determined that claimant had pneumoconiosis arising out of his coal mine employment, but hat he was not totally disabled by pneumoconiosis or any other respiratory or pulmonary condition. Therefore, the evidence presented in connection with this subsequent claim must establish that the claimant is totally disabled as a prerequisite for establishing the claimant's entitlement to benefits under the Act (*see* §725.309(d)(2)).

Claimant can establish that he is totally disabled if he suffers from:

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[3] All of the x-ray interpretations in the record are positive for pneumoconiosis, and Drs. Goldstein, Hawkins, Chaves and Vines all diagnose pneumoconiosis. None of the doctors whose opinions are in the record conclude that the miner does not have pneumoconiosis.

[4] All of the regulations cited in this decision are contained in Title 20 of the Code of Federal Regulations.

> a pulmonary or respiratory impairment which standing alone, prevents . . . [claimant] . . . [f]rom performing his usual coal mine work; and [f]rom engaging in gainful employment in the immediate area of his . . . residence requiring the skills or abilities comparable to those of any employment in a mine or mines I which he . . . previously engaged with some regularity over a substantial period of time.

(*see* §718.204(b)(1(i)-(ii)). A claimant can demonstrate total disability in several ways (*see* §718.204). Since the record contains no evidence of complicated pneumoconiosis; the irrebuttable presumption in §718.304 does not apply in the instant case; there is no evidence that the claimant suffers from cor pulmonale; and the presence of medical evidence in the record precludes establishing total disability through lay evidence, the claimant is limited to proving his total disability through medical opinions, pulmonary function studies and arterial blood gas studies (§718.204(c)).

Two pulmonary function studies were conducted since the previous claim was denied. (*see* DX 10; EX 5). The FEV_1 needed to qualify for presumptive total disability under Appendix B to Part 718 for a man 68 inches tall and 72 years old (as he was for Dr. Hawkins's study) is 1.73. Dr. Hawkins's April 9, 2003 test produced an FEV1 of 1.89. Accordingly, the April 9, 2003 pulmonary function study did not produce qualifying values. On the other hand, Dr. Vines had pulmonary function studies run on September 18, 2001 which produced an FEV1 of 1.68 and an MVV of 60, which are qualifying values for a man 70 years old and 68 inches tall.[5] Those qualifying values are 1.74 for the FEV1 and 70 for the MVV. However, Dr. Selby reviewed this test report and said it is invalid because "the spirometry trials are not present on this one-page report . . . " and the test was run too soon after claimant's open heart surgery. *See* EX 1, at 11. Since the only valid pulmonary function test produced non-qualifying values, the pulmonary function studies do not establish total disability. In regard to the blood gas studies, Dr. Hawkins's is the only probative one in the record conducted since the previous denial of benefits (DX 10),[6] and it produced very high values which do not meet the standards for presumed total disability under Appendix C to Part 718. Accordingly, claimant has not established total disability through pulmonary function or blood gas studies.

Finally, total disability can be proven through well-reasoned medical reports. The record contains reports of several treating doctors (Drs. Chaves – EX 4; Vines – EX 5; Settle – EX 6); one doctor who conducted a black lung examination (DX 10 – Dr. Hawkins); and two doctors who prepared reports based on their reviews of the medical evidence (Dr. Selby – EX 1; Dr. Goldstein – EX 2). Dr. Chaves, who was claimant's primary care physician, treated the claimant in 1997, then again from July, 2001 through April, 2003. He repeatedly notes that claimant has no shortness of breath or dyspnea on exertion in his 2001 and 2002 reports. Dr. Vines

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[5] Neither party mentioned this blood gas test in either their pre-hearing statements or post-hearing briefs.

[6] A blood gas test was conducted on August 17, 2001, while claimant was hospitalized following the bypass surgery. (*see* EX 6). Since oxygen was being administered to the claimant at that time, the results obtained are not probative.

apparently was called in for a pulmonary consultation following claimant's bypass surgery, and treated the claimant for only a short time. Dr. Settle, a cardiologist (*see* EX 4, office note of July 22, 2002), treated the claimant from July, 2001 through July, 2002. He performed a cardiac catherization on August 17, 2001 which revealed severe triple vessel coronary artery disease, leading to the bypass surgery by Dr. Shannon. All of the treating doctors, although diagnosing coal workers' pneumoconiosis and COPD, consistently note that claimant has no shortness of breath or dyspnea on exertion except for a short period immediately preceding his bypass surgery.

Dr. Hawkins, a board-certified pulmonary specialist (DX 25), examined the claimant on May 3, 2003 for the Department of Labor (*see* DX 10). He conducted a thorough cardiopulmonary examination including a history and physical, pulmonary function and blood gas testing, an EKG, and chest x-ray. The x-ray was interpreted by Dr. Ballard, a B-reader (a Government-certified expert in interpreting x-rays for pneumoconiosis), as positive for pneumoconiosis; the pulmonary function study produced low but not qualifying values which Dr. Hawkins stated showed moderate obstruction; and the blood gas tests, both before and after exercise, were essentially normal. Based on the results of his examination, Dr. Hawkins diagnosed coal workers' pneumoconiosis and asthmatic bronchitis due to smoking. He concluded that the claimant had moderate exertional dyspnea due half to asthmatic bronchitis and half to coal workers' pneumoconiosis, and stated that the claimant cannot perform manual labor. In a short letter to claimant's counsel dated February 27, 2004, Dr. Hawkins confusedly concluded that "[claimant's] current impairment is inadequate to allow Mr. Plyler to perform his last coal mine job (drill operator) because of the intensity of work required." (DX 25).

Finally, there are the reports of Drs. Selby and Goldstein, both of whom are board-certified pulmonary specialists and B-readers (*see* EX 1, 2), who conducted reviews of the medical records for the employer. Dr. Goldstein's opinion can be disposed of quickly. It is his opinion that claimant's pulmonary symptoms are related to smoking because "individuals with simple coal workers' pneumoconiosis do not have significant symptoms." EX 2, at 2. This conclusion is clearly contrary to the Act and regulations which, by providing that miners with simple pneumoconiosis can be awarded benefits, presumes that simple pneumoconiosis can cause total disability. Accordingly, Dr. Goldstein's opinion is not probative.

Dr. Selby provided a long report (EX 1) in which he summarizes all of the medical evidence in the record since the previous denial of benefits and occasionally comments on some of it. His principal comments are directed to Dr. Hawkins. He disagrees with Dr. Hawkins's conclusion that claimant has a moderate pulmonary impairment. Rather, he believes that if claimant received appropriate medical treatment for his asthmatic bronchitis he would have normal pulmonary function. He bases his opinion primarily on the blood gas tests conducted by Dr. Hawkins, which he states produced above normal values, precluding a pulmonary impairment regardless of the results of the pulmonary function testing. But he states that even if proper treatment of claimant's condition did not result in normal pulmonary function, any impairment would be due to claimant's cigarette smoking history of 60 pack years. He notes that coal workers' pneumoconiosis causes a restrictive disease, and claimant has no restriction. He adds that "[s]ome believe coal workers' pneumoconiosis can cause obstructive disease. That is laughable in this case with such severe cigarette smoking over such a long time which has a far

stronger association with obstructive disease." EX 1, at 14. Finally, he stated that if claimant is disabled from working at his usual coal mine job, it would be related to his severe cardiac disease (*id*. at 15).

Taken together, the medical opinion evidence fails to prove that the claimant's condition has changed so he is now totally disabled. Only Dr. Hawkins concluded that claimant has a respiratory or pulmonary impairment which prevents him from returning to his last coal mine job. Dr. Hawkins's April 9, 2003 report consists of his filling in boxes on the Department of Labor black lung examination form. His terse comments on this form provide little explanation of his conclusions. He does not explain why he believes claimant's moderate exertional dyspnea precludes him from performing manual labor, or whether he considers the claimant's job as a driller to be manual labor. Nor does he explain why he attributes half of claimant's moderate exertional dyspnea to asthmatic bronchitis and half to coal mining when claimant worked as a miner for only 16 ¾ years and smoked for 60; last worked as a miner in 1986 but continued to smoke regularly at least until 2004; and had a purely obstructive impairment, the type of impairment characteristic of smoking (although pneumoconiosis can also result in obstructive impairment). In addition, Dr. Hawkins did not even list claimant's CAD in the cardiopulmonary diagnoses section of the report, and does not discuss its effect on claimant's exertional dyspnea. Dr. Hawkins's February 27, 2004 letter is no better. In it, he does not mention CAD, and his conclusion regarding claimant's impairment, which is quoted above, is so poorly stated that it makes no sense. But assuming he was trying to say that claimant's impairment would not allow him to perform his last coal mine job, he does not state which impairment he is talking about. Going one step further and assuming he was referring to a respiratory or pulmonary impairment, he does not state why that impairment is attributable to coal workers' pneumoconiosis rather than smoking or CAD. Dr. Hawkins's opinion as expressed in these two documents is not well reasoned and has no probative value.

Dr. Selby's report also strains credibility. Despite all the positive x-ray readings in the record, including his own, he still will not admit that the claimant has pneumoconiosis. In addition, his opinion that if a person's blood gases are not impaired there is no pulmonary impairment regardless of what the x-rays and pulmonary function tests show, is inconsistent with the regulations, which permit a finding of total disability based on pulmonary function tests regardless of the results of blood gas tests. Further, his conviction that he knows how to treat the claimant better than claimant's own doctors despite the fact that he has never even seen the man is incredibly arrogant, as is his statement that it is laughable to attribute any of claimant's obstruction to coal mining due to his smoking history. I give little weight to Dr. Selby.

The most probative evidence clearly is the treatment notes of Drs. Settle, Chaves and Vines. What is most significant in their reports is the lack of treatment for coal workers' pneumoconiosis and COPD even though both conditions were regularly diagnosed. This is consistent with claimant's usual reports of no shortness of breath or exertional dyspnea, as well as his continuing to work part-time until he had to undergo bypass surgery. The only time shortness of breath is mentioned is around the time of claimant's bypass surgery. These treatment records indicate that the claimant was not significantly impaired by shortness of breath or dyspnea on exertion relating to pneumoconiosis or COPD.

Since the evidence filed in connection with the claimant's subsequent claim does not prove that the claimant has a totally disabling respiratory or pulmonary impairment, claimant has failed to prove a change in conditions. Therefore, this subsequent claim must be denied.

ORDER

IT IS ORDERED that the subsequent claim of James D. Plyler for black lung benefits is denied.

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JEFFREY TURECK
Administrative Law Judge

NOTICE OF APPEAL RIGHTS: If you are dissatisfied with the administrative law judge's decision, you may file an appeal with the Benefits Review Board ("Board"). To be timely, your appeal must be filed with the Board within thirty (30) days from the date on which the administrative law judge's decision is filed with the district director's office. *See* 20 C.F.R. §§ 725.458 and 725.459. The address of the Board is: Benefits Review Board, U.S. Department of Labor, P.O. Box 37601, Washington, DC 20013-7601. Your appeal is considered filed on the date it is received in the Office of the Clerk of the Board, unless the appeal is sent by mail and the Board determines that the U.S. Postal Service postmark, or other reliable evidence establishing the mailing date, may be used. *See* 20 C.F.R. § 802.207. Once an appeal is filed, all inquiries and correspondence should be directed to the Board.

After receipt of an appeal, the Board will issue a notice to all parties acknowledging receipt of the appeal and advising them as to any further action needed.

At the time you file an appeal with the Board, you must also send a copy of the appeal letter to Donald S. Shire, Associate Solicitor, Black Lung and Longshore Legal Services, U.S. Department of Labor, 200 Constitution Ave., NW, Room N-2117, Washington, DC 20210. *See* 20 C.F.R. § 725.481.

If an appeal is not timely filed with the Board, the administrative law judge's decision becomes the final order of the Secretary of Labor pursuant to 20 C.F.R. § 725.479(a).